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Fair Credit Reporting Compliance
and the CFPB Proposed
Debt Collection Regulations

**PBI FINANCIAL SERVICES AND
BANKING LAW UPDATE**

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Fair Credit Reporting Compliance

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FCRA Litigation – Furnishers

- Investigation of Consumer Disputes – 15 U.S.C. § 1681s-2(b)
- Elements of Claim
 - Inaccurate Information
 - Notice of Dispute from CRA
 - Reasonable Investigation
- Damages – Depends on Negligent or Willful Violation

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FCRA Litigation – Furnishers

- Ways to Defend
 - Wrong provision of FCRA
 - No notice of dispute from CRA
 - Reasonable investigation conducted
 - Furnisher made requested correction
 - No actual damages/causation
 - No standing
 - No inaccuracy

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FCRA Litigation – Furnishers

- Accuracy
 - Legal versus factual accuracy
 - Metro 2
 - Post-bankruptcy reporting
 - Post-discharge reporting and historical accuracy (*Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 51877 (N.D. Cal. Apr. 10, 2013))
 - Scheduled Payment – historical? (*Connor v. JP Morgan Chase Bank, N.A.*, 2016 U.S. Dist. LEXIS 66976 (N.D. Ill. March 22, 2016); *Freedom v. Citifinancial, LLC*, 2016 U.S. Dist. LEXIS 97533 (N.D. Ill. July 25, 2016))
 - Post-Chapter 13 plan confirmation (*Field v. Experian Info. Solutions, Inc.*, 2017 U.S. Dist. LEXIS 62133 (N.D. Cal. Apr. 24, 2017))

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FCRA Litigation – Users

- Users must have “permissible purpose” – 15 U.S.C. § 1681b
- Litigation issues
 - Permissible purpose or just *reasonable belief* in permissible purpose (*Blumenfeld v. Regions Bank*, 2018 U.S. Dist. LEXIS 150837 (N.D. Ala. Sept. 5, 2018))
 - Litigation with consumer as permissible purpose (*Hill v. Ocwen Loan Servicing, LLC*, 2019 U.S. Dist. LEXIS 44962 (N.D. Ga. Feb. 15, 2019))
 - Standing (*Browner v. Am. Eagle Bank*, 355 F. Supp.3d 731 (N.D. Ill. 2019))
 - Post-bankruptcy discharge reporting on mortgage (*Vanamann v. Nationstar Mortg., LLC*, 735 Fed. Appx. 260, 2018 U.S. App. LEXIS 13010 (9th Cir. 2018))

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Identity Theft

- Furnisher's FCRA obligations – 15 USC § 1681s-2(a)(6)
 - Reasonable procedures when report from CRA
 - Report directly from consumer
- “Identity Theft Report” – 12 CFR §1022.3(i)
 - Basic requirements
 - Ability of furnisher to make *reasonable* requests for additional information

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CROs and DMCs

- These organizations continue to inundate creditors, collectors, and credit bureaus with a barrage of disputes
- Trying to frustrate collections and drive leverage for settlement
- Consumers sometimes are not aware of representation
- Consumers also beginning to use same letters after locating online
- Most letters raise a host of dispute issues, include C&D requests, and can be several pages long
- Do not expect any short-term help from CFPB/FTC on the horizon
- State AGs will consider offering assistance when prepare the record

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Legal Options

- CROA (15 USC 1679)
 - Requires protections and certain disclosures in connection with the offering or sale of “credit repair” services
 - Agreements must be in writing; no advance payments; consumer cancellation rights
- FCRA
 - 15 USC 1681s-2(a)(8)(G): No obligation to respond to disputes submitted by CROs on behalf of consumers OR disputes from consumers on forms supplied by CROs
 - 15 USC 1681s-2(a)(8)(F): abbreviated dispute response requirements
- How do you know?
 - Palates of letters, similarities in “unique” language, bulk mail stamps from same location, consumers often reside elsewhere

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Opportunities for Efficiency

- Automate the dispute identification and response process as much as possible to reduce cost
 - Ability to automate review of letters using AI/text recognition tools
 - Automate letter response
 - Systemically identify subsequent disputes on same account
- Develop a reliable process for identifying and responding to repeat disputes
 - Standard letter that is automatically generated
 - Some creditors/collectors have limited the number of times they will respond due to costs
- Document evidence of CRO/DMC involvement
 - Note when allegedly represented consumer call about their accounts
 - Detail dispute received to develop anecdotal evidence
 - Credit bureaus as partners to identify CROs and DMCs using metrics and data

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Sharing Information

- Who is sharing the information? § 1681a(f)
 - A company being paid for its services
 - A member of an information pool or exchange
 - An uncompensated third party (really?)
- How often is information shared? § 1681a(f)
 - All the time as part of normal business practice
 - On some periodic basis
 - Rarely

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Sharing Information (continued)

- Why was the information assembled? § 1681a(f)
 - To determine eligibility for credit, insurance, or employment
 - For other purposes
- What is being shared? § 1681a(d)(2)(A)
 - Experience information
 - Other information

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Sharing Information (continued)

- Who is the recipient? § 1681a(d)(2)(A)
 - An affiliate
 - An unrelated entity
- What are they going to do?
 - Use it for marketing §§ 1681b(a), 1681s-3
 - Use it to determine eligibility for credit, employment or insurance §§ 1681a(d), 1681a(f)
 - Use it for other purposes § 1681b(a)

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The Big Data/AI Revolution

- So many datasets are now available about consumers' behavior, and AI models allow companies to make sense of large data sets and use them for accurate predictions
- Big data and AI are already being used for modeling in all aspects of the credit cycle, including underwriting
- But this technology change raises two questions: (1) are we dealing with a CRA? and (2) how do we handle adverse action notices?

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Information Sources as CRAs

- The definition of “consumer report” in the FCRA is broad, generally encompassing a collection of consumer information that will be used for specific purposes – like credit underwriting
- Lenders using alternative data for underwriting need to ensure that they have assessed whether the source of that data is a CRA or not
- Status as a CRA imposes obligations on the CRA itself, but also on the user – credit bureau disclosures, adverse action notices, dealing with direct and indirect disputes

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Consumer Report - § 1681(a)(d)

- The term “consumer report” means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
 - (A) credit or insurance to be used primarily for personal, family, or household purposes;
 - (B) employment purposes; or
 - (C) any other purpose authorized under section 1681b of this title.

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Consumer Reporting Agency – § 1681(a)(f)

- The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

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Adverse Action Notices

- Two challenges with AANs: (1) how to treat alternative data, and (2) ascertaining the reasons for a decline with an AI model
- In terms of describing the data element that contributed to a decline, the disclosure must be descriptive enough to enable a consumer to understand it (and dispute it) – there is no “pass” for alternative data
- This requirement leads many creditors not to use specific types of alternative data in underwriting

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Adverse Action Notices (continued)

- The other challenge with AI models is their complexity and, sometimes, lack of transparency about what factors actually led to a decline
- For less-transparent models, lenders must devise a work-around like performing a regression analysis of the AI model's results
- New trend of “explainable AI” may alleviate this problem by providing more transparency

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The CFPB's Proposed Debt Collection Regulations

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A Revolution in Collections?

- The proposed rules cover a number of topics, but the biggest thrust seems to be designed to bring about a massive shift in collection operations
- The combination of very restrictive call frequency restrictions and rules enabling engagement by text/email appears designed to move the collections industry from a call-based contact strategy into digital contact channels
- Arguably, this transformation was already underway – slowly – but the rules may make the transition much more rapid
- The big unanswered question is whether consumers will respond to digital contact (in terms of payment) in the same way as telephone contact
- If not, then the rules may simply make credit less available and/or channel more consumers into legal collections

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It's Just Third-Party, Right?

- Even though the proposed rules only apply to “debt collectors” covered by the FDCPA, there are several reasons for creditors collecting their own debts to be highly attentive:
 1. The rules would require close creditor-collector collaboration, and would impose duties on creditors to facilitate digital contact by the debt collector (e.g., notice and opt-out procedure)
 2. Creditors will have to monitor for compliance with the rules
 3. There are several avenues through which the proposed rules could be applied to creditors by the CFPB or other regulators

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Deceased Consumers – 1006.2(e) etc.

- One of the great surprises of the rule was the amount of attention paid to collection of deceased consumers' debts
- The rule, in general, is designed to extend the protections of the FDCPA to the surviving relatives/representatives of the estate
- It also makes it easier to communicate with a person authorized to represent the estate, even if not formally appointed by a probate court

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Limited Content Message – 1006.2(j)

- Must include:
 - Consumer's name
 - Request that the consumer reply to the message
 - Name of a natural person(s) the consumer can call back
 - A telephone number (no vanity numbers)
 - Opt out (if text/email)
- Additional, optional content:
 - A salutation
 - Date and time of the message
 - Generic statement that the call relates to an "account"
 - Suggest dates and times for the consumer to respond
- No other content is permitted but this message can be left in the event a third-party answers the call

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Time/Place Restrictions – 1006.6

- Prohibits contacting consumers at times/places that are known/should be known to be inconvenient
 - Work numbers/email presumptively inconvenient
 - Presumes that communications before 8 am or after 9 pm in the consumer’s time zone are inconvenient
 - If multiple potential time zones, contact must be within permissible window in all time zones
 - Time determined based on when sent by collector
- Consent cannot be obtained during the same communication where the collector learned the time is inconvenient
- Consent must be given directly to the collector to enable contacting the consumer at previously identified “inconvenient times/places” (e.g., work, if represented, or otherwise inconvenient)

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Time/Place Restrictions – 1006.6

- The collector may respond once if a consumer contacts them using a method or during a time that is inconvenient within that window but may not resume regular communication attempts at that time/using that channel
- Words like “this is not a good time”, “I can’t talk during these hours”, “this is inconvenient” or “I can’t talk when I am school” are examples provided of sufficient language to label something inconvenient
- A cease and desist request can be sent by phone, text, email, or letter – any channel that the collector regularly uses to communicate with the consumer

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“Consumer” Special Definition – 1006.6(a)

- Special definition of “consumer” for purposes of §§ 1006.6 (communications in connection with debt collection) and 1006.14(h) (prohibited communication media)
 - “Consumer” includes: (1) spouse, (2) parent, if consumer is a minor, (3) legal guardian, (4) executor or administrator of consumer’s estate, or (5) a confirmed successor in interest, as defined in Reg. X (12 CFR 1024.31) and Reg. Z (12 CFR 1026.2(a)(27)(ii))
- 2016 CFPB Interpretive Rule – Safe harbor from FDCPA liability for complying with amended mortgage servicing rules
 - Communications with a confirmed successor in interest are not prohibited third party communications
 - Early intervention contact and borrower-initiated loss mitigation communication despite FDCPA cease communication request

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Text & Email – 1006.6(d)(3)

- Text and email can be used to communicate about the debt
 - Establishes three safe harbor approaches for obtaining consent to use these technologies:
 1. Email/telephone number the consumer recently used to contact the collector for reasons other than opting out (and, if a work email, the collector neither knows nor has reason to know that the employer prohibits using that email); OR
 2. A non-work email/telephone number that the creditor or collector conspicuously disclosed previously (either electronically, orally, or verbally) through a separate channel that the non-work email/number would be used for collection communications no more than 30 days before such use and the consumer does not opt out during that time; OR

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Using Text and Email – 1006.6(d)(3)

3. A non-work email/telephone number that the creditor/a prior collector obtained from the consumer to communicate about the debt that the creditor/prior collector “recently” (proposal: 1 year prior) to communicate with the consumer about the debt with a “reasonable period”
 - Must include a conspicuous and clear opt out option
 - Text example - “Reply STOP to stop texts to this number”
 - Email example - include instructions in the body of the email to respond “Stop” in the subject line
 - May respond to the consumer to confirm receipt of the opt out request, provided no other information is included
- Prohibits communicating using a social media platform that is viewable by a third-party/social media contacts for all communications, including limited content (but direct messaging seems ok)

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Call Restrictions – 1006.14

- No more than 7 call attempts within 7 consecutive days permitted
 - Across all numbers *per debt* (student loans = includes all debts serviced under a single loan number)
 - Includes limited content messages
 - Exempts text and email
- 7 day waiting period after a successful contact
 - Leaving a message = successful contact
 - Delivering a ringless voicemail = successful contact
 - Location call or attempted communication can become a successful call and trigger the waiting period
- Not included in limits: (1) returning consumer requests for information/a call back, (2) calls that do not connect (busy signal, out of service/disconnected message), and (3) calls that went to a number that does not actually belong to the consumer

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Meaningful Attorney Involvement – 1006.18(g)

- The proposed rules adopts a “plain vanilla” standard for meaningful involvement, styled a “safe harbor,” which borrows language from Rule 11
- No standard is provided for sending letters – only litigation. Why? And is the standard different?
- How useful is this new “safe harbor” likely to be?

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Time-Barred Debt – 1006.26

- Reiterated what we already knew = you cannot take legal action or threaten to take such action on a debt that you know or should know is time-barred
- Requesting comment on: (1) the know or should know standard vs. strict liability; and (2) whether to require certain disclosures about the debt’s time-barred status
- How should the applicable date be calculated?
- Who should do the calculations?
- Can reps and warranties be used to protect the creditor/agency or the debt seller/purchaser?
 - Note that the NPRM proposes to clearly define passive debt buyers as debt collectors under the FDCPA

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Credit Reporting – 1006.30(a)

- Must communicate with the consumer about the debt first before reporting the debt to credit bureaus
 - No “passive” debt collection through credit bureaus because of potential for consumer harm
 - Must convey information about the debt directly or indirectly but may do so through any medium, such as by sending a validation notice
 - An unsuccessful attempt to communicate is not a communication and neither is a limited content message

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Validation Notice – 1006.34

- Timing
 - In the initial written or electronic communication or within five days thereof (unless the debt is paid beforehand)
 - Orally in the initial communication (comments requested on content and format)
- Recipient if consumer is deceased
- Contents
 - Debt collector communication disclosure
 - Information about the debt
 - Information about consumer protections
 - Consumer response information
 - Optional disclosures

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Validation Notice – 1006.34

- Debt collector communication disclosure
- Information about the debt (all information must be provided)
 - Collector name and address
 - Consumer name and address (most complete info. obtained)
 - Merchant brand for credit card debt
 - Creditor name for consumer financial product or service debt
 - Account number on itemization date (or truncated version)
 - Name of current creditor
 - Itemization date (statement, charge-off, payment, or transaction)
 - Amount of debt on itemization date
 - Itemization in tabular format
 - Current amount of the debt

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Validation Notice – 1006.34

- Information about consumer protections
 - End date of validation period (presumed received after five days)
 - Dispute rights
 - Right to name and address of original creditor
 - Assumption that debt is valid absent timely contact
 - Reference to Bureau website (cons. financial product/service debt)
 - How to take action electronically (if electronic validation notice)
 - Opt out statement (if validation notice in body of email)
- Consumer response information
 - Dispute prompts
 - Original-creditor information prompt
 - Names and mailing addresses for consumer and debt collector

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Validation Notice – 1006.34

- Optional disclosures
 - Telephone contact information
 - Reference code
 - **Payment disclosures**
 - Disclosures required by applicable law
 - Information about electronic communications
 - Spanish language translation disclosures
- Foreign translation
 - Must be accompanied by or preceded by English language notice
- Format
 - Substantially similar to Model Form B-3
 - Electronic notices may use fillable fields and hyperlinks

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Mortgage-Specific Validation Notice – 1006.34(c)(5)

- For debt subject to Reg. Z mortgage periodic statement requirements (12 CFR 1026.41), the validation notice can omit:
 - Itemization date
 - Amount of the debt on the itemization date
 - Itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments and credits since the itemization date
- Only if the debt collector:
 - Provides a copy of the most recent periodic statement provided to the consumer, in accordance with Reg. Z, along with the validation notice, and
 - Refers to the periodic statement in the validation notice

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Disputes – 1006.38(d)

- Disputes may be oral or written (oral blocks assumption debt is valid)
- Must cease collection upon receipt of a timely written dispute
 - Person authorized to act for estate can dispute for decedent
- With written dispute, may not resume collection until either
 - Providing a written or electronic copy of verification or judgment
 - Providing a notice advising that the dispute is duplicative, explaining why, and referring consumer to earlier response
- Duplicative dispute
 - Substantially the same as a prior dispute that elicited a proper response
 - Does not include any new and material information
 - New – Not previously provided
 - Material – Reasonably likely to change verification

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Electronic Disclosures – 1006.42(a)

Overview

- Imposes notice and retainability requirements on Reg F-required disclosures that a collector provides in writing or electronically
 - Exceptions for the electronic opt-out notice and the mini-Miranda, unless those disclosures are given in any of three required notices (**validation notice, original-creditor information response, dispute response**) or in an electronic communication containing a hyperlink to one of these three notices.
- Prescribes rules for satisfying the notice and retainability requirements with respect to electronic delivery of the three required notices
- Sets forth safe harbors for satisfying the notice and retainability requirements

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Electronic Disclosures – 1006.42(b)

Rules for delivering three required disclosures electronically

- Deliver pursuant to:
 - The consumer’s E-SIGN consent, given directly to the collector or
 - “Alternative procedures” (which are based on an E-SIGN consent obtained by the creditor or a prior collector)
- Whichever delivery method is used, collectors must also:
 - Disclose the purpose of the communication in e-mail subject line/ first line of text message (name of current creditor and one other piece of information identifying the debt, aside from amount);
 - Monitor “undeliverable” notices; and
 - For the validation notice, use a “responsive” format (that adjusts to different screen sizes) and make it accessible via screen readers

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Electronic Disclosures – 1006.42(c)-(d)

“Alternative procedures” for providing three required disclosures electronically

- Send to e-mail address or cell number for which the creditor or a prior collector obtained a valid E-SIGN consent that has not been withdrawn
- Disclosure must be in body of e-mail or on a secure website accessible by clear and conspicuous hyperlink
- Hyperlinked disclosures must be:
 - Accessible on website for reasonable period of time and capable of being saved or printed; and
 - Preceded by separate notice and opportunity to opt-out with that debt collector or the creditor

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Electronic Disclosures – 1006.42(e)

Safe harbors

- Mail printed copy to consumer's home (but no safe harbor for undeliverable mail)
- A validation notice may be e-mailed to the consumer in the initial communication if:
 - The notice is in the body of the e-mail; and
 - The collector sends another validation notice electronically within five days of the initial communication that complies with the rules
 - If the second validation notice is sent based on the “alternative procedures,” the collector has the option of e-mailing it to an address that meets the § 1006.6(d)(3) standards

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Form 1099-C Disclosures – 1006.??

- Proposed rule does not include content requirements or model language for disclosures accompanying a Form 1099-C
- Note content requirements for mortgage periodic statements on charged-off loans - Final charge-off periodic statement can be issued if:
 - No additional fees or interest will be charged on the account; and
 - Certain disclosures are added, including:
 - That the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes
 - That the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property
 - That the balance on the account is not being cancelled or forgiven
 - That the loan may be purchased, assigned, or transferred

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Closing Thoughts

- Adapting to the new world of digital contact will require significant work by both debt collectors and creditors
- We believe that a great deal of policy/procedure overhaul and IT system development will be needed, with careful attention paid at each step to the highly complex requirements of the rules
- Testing of consumer contact strategies and messaging will also be needed
- We are probably at least 2 years from the effective date of a final rule, but there is a great deal of work to be done in preparation

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SPEAKER

- Partner at Ballard Spahr and a member of the firm's Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, Higher Education, and Privacy and Data Security Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, TCPA Task Force, and Military Lending Act Task Force
- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on credit reporting, fair lending, servicing and collection issues
- Regulatory practice includes preparing clients for banking agency and CFPB targeted fair lending and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions
- Named a top consumer financial services lawyer by Chambers USA, 2015-2019
- Charter member of the American College of Consumer Financial Services Lawyers
- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services

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James A. Francis

SPEAKER

- JIM FRANCIS has concentrated his practice in consumer protection litigation since the founding of his firm Francis & Mailman, P.C. in 1998. He is one of the nation's preeminent litigators in the areas of fair credit reporting litigation and consumer class actions.
- In 2017, Mr. Francis served as trial counsel in *Ramirez v. Trans Union* (N.D. Cal. 2017), a case that achieved a record \$60 million dollar class action jury verdict for a case brought under the Fair Credit Reporting Act. In 2009, Mr. Francis argued the seminal FCRA case of *Cortez v. Trans Union* before the Third Circuit Court of Appeals. He has been certified to serve as class counsel in over 50 consumer class actions, has been trial counsel in three class actions to successful plaintiff's verdicts, and has served as counsel in most of the largest FCRA settlements in history to date. In 2014, Mr. Francis was one of a small national group of plaintiffs' lawyers to be featured in *Law 360's* Titans of the Plaintiff's Bar. He lectures extensively on the FCRA for continuing legal education seminars, law schools and community groups, and has published articles on the FCRA. In 2004, Mr. Francis was the youngest lawyer to be ranked in the Top 100 Superlawyers in Pennsylvania in *Philadelphia Magazine* and *Pennsylvania Super Lawyers* magazine, and has been regularly ranked one of the Top 100 Superlawyers in Philadelphia since then.
- He currently serves on the Board of Directors of the National Association of Consumer Advocates (NACA).

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